Tax Sovereignty in the BEPS Era

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Tax Sovereignty in the BEPS Era

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CHAPTER 9

The Other Side of BEPS: "Imperial Taxation" and "International Tax Imperialism"

Sergio André Rocha

§9.01 INTRODUCTION

After almost a century orbiting around the basic principles laid down by the 1928 League of Nations draft convention on double taxation, the international taxation field has been shaken by an unexpected and unstoppable force called base erosion and profit shifting (BEPS).

Looking back in history, one will notice that the birth and development of international taxation is intrinsically connected with the creation of Income Tax and with the economic crises that have challenged mankind over the years.

Even though some rudimentary forms of income taxation can be traced far back in time, modern income taxation is actually a creation dating from the 1800s and early 1900s.

In England, Income Tax was first established in 1799 to support the war against Napoleon.[1] However, after more than a century during which the tax was in and out of validity, it was finally and firmly enacted in 1907. According to Charles Adams, "By 1910, British income taxes evolved to where they are today."[2]

The United States of America enacted its first Income Tax in 1862. In 1895, the Supreme Court decided that the tax was unconstitutional because tax revenues had to be shared among the states. In 1909, a new tax was created, which was considered to

1. James Coffield, A *Popular History of Taxation: From Ancient to Modern Times* (Longman, 1970) p. 90.
2. Charles Adams, *For Good and Evil: The Impact of Taxes in the Course of Civilization* (Madison Books, 2001) p. 364.

be an “excise tax” and upheld by the Supreme Court.[3] Only after the 16th Amendment to the Constitution,[4] was the Income Tax definitely established in the United States in 1913.[5]

French Income Tax was created a little later – 1914.[6] According to Professor Guy Gest, “The first French income tax system was instituted by three statutes in 1914 and 1917. It was a mixture of the then English and Prussian systems in that it was characterized by the imposition of seven flat rates on seven different scheduler categories of income (almost the same as today) at the first level and progressive tax on the total of incomes from all scheduler categories accrued to or received by the taxpayer at the second level.”[7]

In the German states, Income Tax was created in the nineteenth century. In Prussia, for instance, the tax was first enacted in 1851. Income Tax was later reformed in 1891.[8] In Professor Wolfgang Schön’s words, “The history of modern income taxation in Germany starts with the Prussian Income Tax Act of 1891, which introduced a systematic ‘source-based’ approach to income taxation. Due to the heavy financial burden of the World War I, the legislative power was shifted to the German Reich by the Weimar Constitution of 1919.”[9]

Income Taxation arrived a little later in Latin America. The tax was created in 1922 in Brazil[10] and only by 1932 in Argentina.[11]

These brief comments about the birth of income taxation obviously do not touch on the controversies surrounding its appearance. It is known that the creation of the Income Tax has incurred strong opposition in all jurisdictions where it was implemented for the first time. Instead, these initial remarks are intended to place the consolidation of the Income Tax historically at the beginning of the twentieth century.

This chronology is important in making the connection between the initial impetus for the development of income taxation and the first steps of international taxation. The tax cooperation treaty signed between France and Belgium in 1843 is singled out by some authors as one of the first tax treaties ever signed.[12] Later, in 1899,

3. Richard L. Doernberg, Howard E. Abrams, and Don A. Leatherman, *Federal Income Taxation of Corporations and Partnerships* (Wolters Kluwer, 2009) p. 3.
4. Seligman commented on the proposition of the 16th Amendment to the U.S. Constitution. *See* Edwin R.A. Seligman, *The Income Tax: A Study of the History, Theory, and Practice of the Income Taxation at Home and Abroad* (The Lawbook Exchange, 1914) pp. 590–627.
5. *See* James Coffield, *A Popular History of Taxation: From Ancient to Modern Times* (Longman, 1970) pp. 230–232; Carlos Araújo Leonetti, “Breve Histórico da Tributação da Renda,” Ubaldo Cesar Balthazar (ed.), *O Tributo na História: Da Antiguidade à Globalização* (Fundação Boiteux, 2006) pp. 273–274.
6. *See* Louis Trotabas and Jean-Marie Cotteret, *Droit Fiscal* (Dalloz, 1997) p. 145; Jacques Grosclaude and Philippe Marchessou, *Droit Fiscal Général* (Dalloz, 2003) p. 47.
7. Guy Gest, “France,” Hugh J. Ault and Brian J. Arnold (eds.), *Comparative Income Taxation: A Structural Analysis*, 2nd Ed. (Kluwer Law International, 2004) p. 37.
8. Ferdinand H. M. Grapperhaus, *Tax Tales From the Second Millennium* (IBFD, 2009) p. 66.
9. Wolfgang Schön, “Germany,” Hugh J. Ault and Brian J. Arnold (eds.), *Comparative Income Taxation: A Structural Analysis*, 2nd Ed. (Kluwer Law International, 2004) p. 53.
10. *See* Benedito Ferreira, *A História da Tributação no Brasil: Causas e Efeitos* (Brasília, 1986) p. 75.
11. *See* Dino Jarach, *Finanzas Públicas y Derecho Tributario* (Abeledo-Perrot, 1996) p. 529.
12. *See* Sunita Jogarajan, *Prelude to the International Tax Treaty Network: 1815–1914 Early Tax Treaties and the Conditions for Action* (Oxford Journal of Legal Studies, 2011) p. 9.

the first double tax convention was signed between Prussia and the Austro-Hungarian Empire. The treaty became necessary after the Austro-Hungarian Empire created its income tax in 1896.[13]

Accordingly, international taxation as it is known today evolved only after the introduction of income taxation as one of the most relevant sources of state revenue. Starting in the twentieth century, western states have organized themselves in such a way that most public revenues are derived from the collection of taxes and not from the exploitation of government property.[14] The importance of income taxation as a source of revenue for modern states – and its weight as a burden on taxpayers – rendered inevitable the development of an instrument to allow countries to share tax revenues and to protect taxpayers against double taxation.

Therefore, the stimulus for the first double tax conventions, which occurred before World War I, was the birth of income taxation. This fact alone shows that – even though modern tax conventions have purposes other than simply avoiding double taxation[15] – there is an unbreakable bond between international taxation and the Income Tax.[16]

Although income taxation is at the core of International Tax Law, the creation of Income Tax alone did not provide sufficient momentum for the development of this field. Indeed, the development of the so-called International Tax Regime[17] is even more consequence of economic chaos and crisis.

If we single out the most important moments for the growth and development of international taxation standards, we will certainly recall the role that the two world wars had in this process.[18]

Indeed, the first great initiative for the development of international taxation followed the end of World War I and the devastation that it provoked throughout Europe. Therefore, one can make a connection between the work of the League of Nations and the economic challenges posed by the end of the conflict.

World War II had a similar impact. It triggered the creation of the Organisation for European Economic Co-operation (OEEC), which was later transformed into the Organisation for Economic Co-operation and Development (OECD). Given that it was up to the OECD to pick-up the work regarding international taxation from where the League of Nations left it, this points once again to the close connection between the end of the war and the focus on the development of international taxation standards.

13. *See* Sunita Jogarajan, *Prelude to the International Tax Treaty Network: 1815–1914 Early Tax Treaties and the Conditions for Action* (Oxford Journal of Legal Studies, 2011) p. 12; Christian Freiherr von Roenne, "The Very Beginning – The First Tax Treaties," Thomas Ecker and Gernot Ressler (eds.), *History of Tax Treaties: The Relevance of the OECD Documents for the Interpretation of Tax Treaties* (Linde, 2011) pp. 24–26.
14. *See* José Casalta Nabais, *O Dever Fundamental de Pagar Impostos* (Almedina, 1998) pp. 199–204.
15. *See* Sergio André Rocha, *Interpretation of Double Taxation Conventions: General Theory and Brazilian Perspective* (Kluwer, 2009) pp. 6–17.
16. *See* Adolfo Atchabahian, *Derecho Tributario Internacional* (Horacio García Belsunce, *Tratado de Tributación*, Astrea, 2003) p. 529.
17. On the "International Tax Regime," *see*: Reuven S. Avi-Yohah, *International Tax as International Law: An Analysis of the International Tax Regime* (Cambridge University Press, 2007).
18. *See* Alberto Xavier, *Direito Tributário Internacional do Brasil*, 8th Ed. (Forense, 2015) p. 75.

History has recently repeated itself. The latest proposed changes in international taxation – which are putting in check long-standing paradigms of this area – are a direct consequence of the global economic crisis that has shaken the world since 2008, and which has impacts still being felt around the globe.

The global economic crisis has forced countries to review their positions on the taxation of cross-border transactions. And it has fostered the largest global reaction against so-called aggressive tax planning in history. At the core of this global reaction is the OECD/G-20 BEPS Project.

Public attention has been focused on large multinationals as culprits, which have been tried and found guilty in the court of public opinion. Moreover, this strong view that large multinationals – and possibly even companies in general – are engaged in "aggressive tax planning" has triggered a reaction from countries that in some cases might be as aggressive as the problem that it intended to counteract.

This development leads us to what we call "Imperial Taxation." This is a view of basic taxation principles such that they can become more protective of the states themselves and less protective of taxpayers.

On the other hand, even though reference is made to the OECD/G-20 BEPS Project, perhaps it would be more accurate to refer to it as the OECD BEPS Project. Even though the G-20 economies have politically backed the Project, it was indeed developed inside the OECD. Yariv Brauner's words seem completely accurate, when he states that, "The OECD was not only charged by the G20 to lead the BEPS project with no supervision beyond the highest political levels but also succeeded in positioning itself as an independent partner to the G20, taking ownership of the project rather than acting in a subordinate role."[19] And Allison Christians perfectly depicts the current international tax political context:

> "Yet despite the specter of the G20 as a 'new model of multilateral engagement', the United States and Europe continue to dominate a virtually impervious institutional architecture of tax policymaking in the form of the Organisation for Economic Cooperation and Development (OECD), an international network of thirty of the world's wealthiest countries. The OECD has long enjoyed a position of central importance in formulating and disseminating tax policy norms, labeling itself the 'market leader in developing [tax] standards and guidelines.' This characterization is widely recognized as accurate and probably impervious to change. The emergence of the G20 as an economic policy leader does not alter this architecture, but provides an opportunity to syndicate OECD policy positions under the new, more inclusive and representative label of G20-endorsed 'internationally agreed tax standards.' To date, the financial crisis and G20 diplomatic leadership have helped the United States and Europe achieve existing tax policy aims by enlisting new support for an existing process of OECD-led tax policy development."
>
> "As a result, the financial crisis may have elevated developing countries to a more prominent policy leadership position in the G20, but G20 leadership may not

19. Yariv Brauner, "Transfer Pricing Aspects of Intangibles: The Cost Contribution Arrangement Model," Michael Lang, Alfred Storck, and Raffaele Petruzzi (eds.), *Transfer Pricing in a Post-BEPS World* (Kluwer, 2016) p. 100.

> provide developing countries with a meaningful voice in global tax policy dialogue. Even so, the rising prominence of the G20 signals that creating opportunities for developing countries to have such a voice is a priority, whether during a time of crisis or beyond. The institutional shift to the G20 thus may have little impact on the current distribution of tax policymaking power, but it may create an institutional infrastructure from which developing countries may exert more influence in the OECD and other institutions where tax policy norms emerge. Understanding the dynamics of leadership in global tax policy therefore requires an examination of the relative capacities of leadership from the G20 and the OECD, as well as other institutions that play a role in influencing the direction of tax reform efforts. That is the aim of this Article. Part I explores the pressure on tax policy that arose from the financial crisis and examines the respective roles played by the G20 and the OECD in tax policymaking during the crisis. Part II compares the institutional capacities of the G20 and the OECD in developing and disseminating tax policy norms, and analyzes the interplay of leadership between these institutions. Part III asks whether and how developing countries can influence tax policy more effectively through the G20."[20]

It is well known that in October 2015, the OECD released the final reports on the fifteen BEPS Actions, which provide several recommendations on how countries should deal with BEPS issues.

Reviewing the BEPS Action Plan, and the OECD's recommendations regarding its Actions, is not the focus of this chapter. What is relevant is that the OECD's BEPS Project recommendations seem to be more and more connected with discussions regarding "harmonization" and "coordination," which is only natural considering its global reach.

This raises the question as to who should perform the coordination role.

It is well known that the OECD is not an internationally independent organ, but rather an association of a certain group of countries. This puts in question whether the OECD's leadership in this matter can be considered independent from the special interests of its member countries.

It is true that the OECD has been trying to attract more and more countries into the debates connected to the BEPS Project – especially after the introduction of its "inclusive framework." Notwithstanding, it is unclear whether such countries – which are not OECD or even G-20 members – will actually have a strong voice in shaping the final outcomes of the Project, or will have the liberty to decide whether or not to implement the OECD's recommendations.

In this context, there is another aspect of BEPS that should be carefully considered – especially by developing countries – which this author will refer to as "International Tax Imperialism."

Beginning with the dawn of international taxation, passing through the League of Nations' meetings in Mexico (1943) and London (1946), and continuing until current times, there has been a long-standing conflict between developing countries and

20. Allison Christians, "Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20" (2010) 5 (1) *Northwestern Journal of Law & Social Policy*, pp. 19–20.

developed countries regarding the sharing of tax revenues that derive from cross-border transactions.[21]

Therefore, if developing and developed countries have different views regarding the criteria for assigning taxing rights globally – and if the reshaping of the "International Tax Regime" is being chaired by the OECD and developed economies – there is justifiable concern that changes to the "International Tax Regime" might be implemented in a way that further benefits developed countries to the detriment of developing nations.

This chapter focuses on commenting on these two aspects: (i) the current environment that is leading us to some sort of "Imperial Taxation"; and (ii) whether the BEPS Project might actually foster some sort of "International Tax Imperialism." This term being understood to mean the exportation of developed countries tax patterns to developing economies in way that favor the former.

One formal note: in this chapter, all direct quotations of texts not originally written in English have been freely translated into English by this author.

§9.02 DEVELOPMENT OF "IMPERIAL TAXATION" IN THE POST-BEPS WORLD

In 2015, people around the globe celebrated the 800th anniversary of the *Magna Carta Libertatum*. This is considered to be the first constitutional-like document that established restrictions on a sovereign's basically unlimited power.

The symbolic relevance of the *Magna Carta* has survived the test of time throughout the centuries because it challenged dogmas (such as "the king can do no wrong") that marked absolutism. As pointed out by Thomas Cooley:

> For several hundred years, however, changes had from time to time been made in the common-law principles by means of statutes. Originally the purpose of general statutes was mainly to declare and reaffirm such common-law principles as, by reason of usurpations and abuses, had come to be of doubtful force, and which, therefore, needed to be authoritatively announced, that king and subject alike might understand and observe them. Such as the purpose of the first great statute, promulgated at a time when the legislative power was exercised by the king alone, and which is still known as the Magna Carta of King John.[22]

In the *Magna Carta*, one can find the earliest origins of the protection of citizens' rights against state power – which is at the base of the bills of rights found in modern

21. There are authors such as João Francisco Bianco and Ramon Tomazela Santos who argue that the source/residence conflict has been overcome (*see* João Francisco Bianco and Ramon Tomazela Santos, "A Change of Paradigm in International Tax Law: Article 7 of Tax Treaties and the Need to Resolve the Source versus Residence Dichotomy," (2016) 70 (3) *Bulletin for International Taxation*. This chapter does not subscribe to such views. The author's position is that current international taxation is still marked by the conflict between source and residence. *See* Veronika Daurer. *Tax Treaties and Developing Countries* (Kluwer, 2014) pp. 22–28.
22. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union* (Little, Brown, and Company, 1883) p. 31.

constitutions and human rights treaties. It is also the *Magna Carta* that marks the development of the principle of no taxation without representation.[23]

No doubt, taxation is one of the areas where the balance between the legitimate exercise of government power and the illegitimate violation of citizens' rights is most challenging.

In current times, the use of the word "citizen" is significant since the term "taxpayer" (as a legal category) has been demonized by some sectors of the media, local governments, and international organizations.

Yes. Before being taxpayers we are all citizens. Even legal entities are ultimately comprised of people.

The transformation of most modern states into fiscal states[24] – i.e., states that depend on tax collection to obtain the resources to fund all their activities – has changed the nature of the obligation to pay taxes. Some authors have begun to argue that there is a fundamental or constitutional obligation to pay taxes.[25] Important works from authors such as Liam Murphy and Thomas Nagel[26] and Stephen Holmes and Cass Sunstein[27] highlight that there is no "pre-tax" income because one's capacity to generate income is dependent on a state's infrastructure paid for by taxes.

However, this line of thought, to which this author subscribes, has been used to support an inversion of the whole structure of tax systems. Legal principles that are, at their core, protections of taxpayers against the state have been transformed into protections for the state against taxpayers.

Consider, for instance, the principle of transparency, which is at the center of modern constitutional, administrative, financial, and tax law.[28] It is, first and foremost, a protection for the citizens against the state. It establishes as a goal a state of affairs that guarantees full disclosure of a government's actions to its citizens.

The principle of transparency is not a one-way street. It also applies to citizens and requires disclosure and combating opaque situations that prevent the due application of laws in general. Nevertheless, one should not forget: State and government transparency come first. Ricardo Lobo Torres has analyzed the principle of transparency from a Brazilian perspective. However, his lesson can also be applied in the realm of international taxation:

> Tax transparency is an implicit constitutional principle. It establishes that financial activity needs to evolve in accordance with standards such as clarity, openness, and simplicity. Therefore, it is directed to the state and to society, to international

23. Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* (Little, Brown, and Company, 1883) pp. 6–7.
24. *See* José Casalta Nabais, *O Dever Fundamental de Pagar Impostos* (Almedina, 1998) pp. 191–221; Sergio André Rocha, *Processo Administrativo Fiscal: Controle Administrativo do Lançamento Tributário*, 4th Ed. (Lumen Juris, 2010) pp. 6–9.
25. *See* José Casalta Nabais, *O Dever Fundamental de Pagar Impostos* (Almedina, 1998) p. 185.
26. Liam Murphy and Thomas Nagel, *The Myth of Ownership* (Oxford University Press, 2002) pp. 31–37.
27. Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (W. W. Norton & Company, 1999) pp. 35–76.
28. *See* Sergio André Rocha, *Troca Internacional de Informações para Fins Fiscais* (QuartierLatin, 2015) pp. 58–62.

> financial organs and to non-governmental entities. It orients and contains problems regarding the preparation of public budgets and their responsible management, the creation of rules against abusive tax planning, the end of bank secrecy, and the fight against corruption.[29]

This maxim seems to have been forgotten by those entities now in charge of reshaping the "International Tax Regime."

Some of the most relevant criticism directed towards the work on transparency and exchange of information that is coordinated by the Global Forum on Transparency and Exchange of Information (hereinafter "Global Forum") is that it has ascribed very little importance to the protection of taxpayer's rights in its crusade to ensure transparency.[30] Regarding transparency, the BEPS Project approach is also not exempt from such criticism.

In October 2015, the New York University School of Law hosted the annual David R. Tillinghast Lecture on International Taxation. The speaker was Pascal Saint-Amans, the well-known Director of the OECD's Centre for Tax Policy and Administration as well as the ultimate coordinator of the BEPS Project.

At the end of the 43rd minute of the speech (which is available on YouTube), Saint-Amans stated that, "Transparency, from my perspective, is transparency from the taxpayer to the Tax Administration, and maybe the other way around as well. You know that there is an Action related to more transparency from the Tax Administrations to the taxpayer and that is the Action 14 on Mutual Agreement Procedures."[31]

With all due respect to Saint-Amans' position, he could not be more wrong.

As previously mentioned, it is impossible to think about the principle of transparency as a legal standard directed first to citizens and only secondarily – if at all – to state and government officials.

We must be very careful with discourses that justify the eclipse of taxpayers' rights that have been gained after centuries of struggle in the war against an archenemy, whether such an archenemy is terrorism, weapons and drugs trafficking, or the surprisingly deemed public enemy no. 1 of countries: multinational enterprises.

In current times, which have been marked by financial crises and the fall of the welfare state (in those countries that have had one), multinationals have been tried and found guilty in the court of public opinion for struggles that common people are facing in their day-to-day lives. Not poor management by state administrations. Not government corruption scandals. But multinationals?

States diminish themselves in face of the all-mighty multinationals. It is claimed that the fight against such powerful enemies requires a new approach to international taxation that puts the protection of taxpayers' rights in second place. The stage is set.

29. Ricardo Lobo Torres, *Tratado de Direito Constitucional, Financeiro e Tributário: Valores e Princípios Constitucionais Tributários* (Renovar, 2005) v. II, pp. 243–244.
30. *See* Sergio André Rocha, "Exchange of Tax-Related Information and the Protection of Taxpayer Rights: General Comments and the Brazilian Perspective" (2016) 70 (9) *Bulletin for International Taxation*, pp. 502–503.
31. Available at https://www.youtube.com/watch?v = K8V_6j1gx-k.

This viewpoint clearly underlies the current approaches to transparency and exchange of information. Taxpayers' notification rights are seen as potential obstacles to effectiveness in the exchange of information and therefore should be ignored.

The first problem with this line of thought is that states are not the weak link compared to multinationals – especially those states that are OECD member countries. The problem is that they operate under the maxim "each man – in this case, each country – for itself."

To some extent, the BEPS Project is an attempt by states to show that they can put aside domestic interests and work together in a coordinated fashion. Whether this will prevail remains to be seen.

However, states should have started by pointing their fingers at themselves. If there is "aggressive tax planning," they are as much to blame for it as large multinationals. As noted by Hugh J. Ault, Wolfgang Schön, and Stephen E. Shay, "MNE behavior is only one side of the coin. International profit shifting and base erosion envisaged by large business enterprises would be ineffective without countries offering preferential tax rules, including low/no tax regimes for particular taxpayers or income categories and benign provisions on profit measurement. To put it differently: MNE tax avoidance is just the flipside of harmful tax competition."[32] This is also the position of authors such as Gema Patón Garcia,[33] Luís Eduardo Schoueri,[34] and Heleno Taveira Tôrres.[35]

The reshaping of fundamental tax principles and the limiting of taxpayers' rights can lead to what this author terms "Imperial Taxation." This produces our greatest concern: how the "regular Joes" – small, mid-size, and even large domestic companies and small multinational corporations – will be affected. We should make no mistake: once legal principles have been mutilated and taxpayers' rights overturned, effects will be felt by all taxpayers of all sizes – humans and legal entities alike.

The public discourse that states are "in dire need of tax revenues" should not be directed only to multinationals. For instance, the notion that transparency is more an *obligation* of taxpayers than their *right* has profound domestic tax implications.

The financial crises and their impacts on countries' budgets have triggered a significant change in the relationship between states and taxpayers. For instance, in Portugal the crisis was used to justify an attempt to overcome basic taxpayers' rights, such as the right not to be charged new or increased taxes in the same fiscal year these

32. Hugh J. Ault, Wolfgang Schön, and Stephen E. Shay, "Base Erosion and Profit Shifting: A Roadmap for Reform," (2014) 68 (8) *Bulletin for International Taxation*, p. 276.
33. Gema Patón Garcia, "Análisis de las Medidas Españolas Alineadas con el Plan de Acción BEPS: Desafíos en la Implementación e Incidencia en Latinoamérica," ILADT, *Memorias de las XXVII Jornadas Latinoamericanas de Derecho Tributario* (ILADT, 2015) p. 186.
34. Luís Eduardo Schoueri, "O Projeto BEPS: Ainda uma Estratégia Militar," Marcus Livio Gomes and Luís Eduardo Schoueri (eds.), *A Tributação Internacional na Era Pós-BEPS* (Lumen Juris, 2016) v. I, p. 30.
35. Heleno Taveira Tôrres, *Direito Tributário Internacional: Planejamento Tributário e Operações Transnacionais* (Revista dos Tribunais, 2001) p. 68.

taxes were created or increased. Naturally, this move was argued based on the country's state of financial emergency.[36]

The role played by the public opinion is also very dangerous. The "Scarlet Letter" that was initially hung on multinationals is easily passed along to other taxpayers, damning the entrepreneurial class as a whole.

Financial need and people on the streets is a dangerous combination in the hands of populist governments and can pose a threat to taxpayers' rights. Brazil's current situation is a perfect example. Under huge budgetary pressure, taxes are being created or increased – not always in accordance with constitutional provisions – thereby putting taxpayers' ability to pay at risk.

Both the Global Forum's and BEPS' work share a common feature: they are aimed at optimizing states' tax collection. The taxpayer – the citizen – is not in their focus. This is unacceptable. There is nothing more urgent than recovering the taxpayers' protagonist role in taxation, where they rightfully belong. This does not mean that tax authorities' focus is completely misguided. It only means that they need to find a way to achieve their rightful objectives without leaving taxpayers' rights behind.

§9.03 "INTERNATIONAL TAX REGIME" AND "INTERNATIONAL TAX IMPERIALISM"

From a historical perspective, "imperialism" refers to the control by more economically and militarily developed nations over less developed countries. The word "imperialism" is often used to refer to the "colonization" of African, Asian, and Latin American countries by European countries.

The attempt to export an "International Tax Regime" to developing countries can be considered a form of "International Tax Imperialism." Even the concept of "developing countries" is arbitrary, since it encompasses countries with significantly different economic and political features.

As used in this chapter, "International Tax Imperialism" means the transformation of certain tax criteria that favor the interests of developed economies into international tax standards that become considered as basic principles of international taxation.

In a previous article, the author used as an example of "International Tax Imperialism" the defense of the so-called principle of the permanent establishment[37] to assign taxing rights to source countries.[38] As stated in that article:

36. *See* Suzana Tavares da Silva, Sustentabilidade e solidariedade em tempos de crise, José Casalta Nabais and Suzana Tavares da Silva (eds.), *Sustentabilidade Fiscal em Tempos de Crise* (Almedina, 2011) pp. 61–91.
37. *See* Alexander Hemmelrath, "Article 7. Business Profits," Klaus Vogel (ed.), *On Double Taxation Conventions*, 3rd Ed. (Kluwer Law International, 1998) pp. 399–400; Carlo Garbarino, *Manuale di Tassazione Internazionale* (IPSOA, 2005) p. 163; Alberto Xavier, *Direito Tributário Internacional do Brasil*, 7th Ed. (Forense, 2010) pp. 551–552; Ekkehart Reimer, "Article 7. Business Profits," Ekkehart Reimer and Alexander Rust (eds.), *Klaus Vogel on Double Taxation Conventions*, 4th Ed. (Kluwer, 2015) v. I, p. 501.
38. Sergio André Rocha, "International Fiscal Imperialism and the 'Principle' of the Permanent Establishment," (2014) 68 (2) *Bulletin for International Taxation*, pp. 83–87.

> "Calderón Carrero (2004) also describes the rule under article 7(1) of the OECD Model as 'one of the great principles of international taxation in relation to the taxation of business income', adding that justification may be found in the fact that 'an enterprise of one contracting state that carries on business in another state does not participate to a significant extent in the 'economic life' of the other state, unless it operates in its territory through a permanent establishment'. The same justification appears in the Commentary on Article 7 of the OECD Model (2010)."
>
> "There are no grounds for contesting, and this is certainly not our intention in this article, the fact that the 'principle of the permanent establishment' is a valid and coherent criterion for the distribution of taxing rights between countries that sign a tax treaty. However, it seems that it is nothing more than a reasonable criterion; certainly not a fundamental principle of international tax law."
>
> "It is evident that by stating that this 'principle' is a fundamental rule of international taxation, the intention is to eliminate the possible consideration of other criteria that are also legally valid and coherent for the taxation of business profits – such as taxation, whether exclusive or concurrent, of such earnings by the source country – an argument that has constantly been raised by developing countries, especially Latin American ones."[39]

The notion that passive income should only – or mostly – be taxed at the state of residence is another example of the transformation of one possible taxing standard into "the standard" for assigning the "fair share of tax" among countries.

It is fairly clear that the OECD has usually been the number one "spokesperson" for the developed countries' interests, and its Model Tax Convention is the formalization of the standards that favor such countries.

This situation led to the development of the UN Model Convention. However, this Model fell short in protecting developing countries rights. As well noted by Francisco Dornelles (who served as Brazil's representative in the committee that drafted the UN Model), the decision to use the OECD Model as a basis and to maintain the requirement of a permanent establishment to allow taxation at source in the case of business profits significantly reduced the capacity of the UN Model to protect the interests of developing countries.[40]

The attempt by countries to seek to impose their fiscal policies through the monopolization of international organizations is not surprising. It is a common feature in the history of mankind. Another feature that can be observed is what we call "theoretical tax imperialism."

With the considerable growth of International Tax Law in recent years, researchers from developing countries have been devoting more and more time to works prepared abroad. Students and researchers have been taking courses abroad and bringing back to their home countries the results of their international experience. LLM

39. Sergio André Rocha, "International Fiscal Imperialism and the 'Principle' of the Permanent Establishment," (2014) 68 (2) *Bulletin for International Taxation*, pp. 84–85.
40. *See* Francisco Dornelles, "O Modelo da ONU para Eliminar a Dupla Tributação da Renda e os Países em Desenvolvimento," Agostinho Toffoli Tavolaro et. al. (eds.), *Princípios Tributários no Direito Brasileiro: Estudos em Homenagem a Gilberto de Ulhôa Canto* (Forense, 1988) pp. 195–232.

programs on international taxation in the United States and throughout Europe are packed with students from Latin America, Africa, and other developing regions.

This interchange is extremely positive for the development of a body of national legal principles. However, for this purpose, it is important that this “importation” of foreign research and ideas be carried out in a critical manner – without the wholesale substitution of national doctrine for international doctrine and allowing room for the former to incorporate the phenomenon of international taxation in light of its own context.

In part, “tax colonization” is also a consequence of the incestuous relation between academic research and legal tax practice in developing countries.

Unlike developed countries, it is extremely rare in developing ones to find academics that are devoted full-time to academic activities. More often than not, academics are also lawyers, who are heavily engaged in defending clients against charges from local tax authorities. Therefore, there is little concern with whether the country should be allowed to levy taxes or not. The focus, instead, is to eliminate source taxation.

Besides this fact, which compromises academic independence, there is another one that is even more grave. In some countries – and this is the case with Brazil – international tax literature is not even mostly produced by academics, but by practitioners. These experts are usually not concerned with international tax policy issues or with whether their countries should be entitled to more taxing rights in the international taxation scheme. Nearly universally, practitioners tend to be more concerned with their client’s interests than with national tax policy.

The consequence of this state of affairs is “colonized” tax literature, that sometimes (uncritically) reproduces foreign opinions and standards without analyzing their impacts from a national tax policy perspective.

§9.04 BEPS AND “INTERNATIONAL TAX IMPERIALISM”

The BEPS Project reflects the concerns mentioned above. Under the banner of multilateralism, “International Tax Regime” may be being reshaped in favor of developed countries. The paragraphs below comment on some areas where developing countries should be particularly careful with the obvious solutions presented by the OECD in its BEPS reports.

[A] Arbitration

The debates about using arbitration to settle international tax disputes – or about creating an international tax court for the same purpose – are not new in international taxation.[41] However, after the inclusion of Article 25(5) in the 2008 update to the OECD Model Convention, this topic became even more pressing.

41. Sergio André Rocha, *Interpretation of Double Taxation Conventions: General Theory and Brazilian Perspective* (Kluwer, 2009) pp. 188–194.

The final report on Action 14 of the BEPS Project encouraged countries to adopt mandatory binding arbitration in their treaties as an instrument to resolve controversies regarding the application of tax treaties. According to this report:

> The business community and a number of countries consider that mandatory binding arbitration is the best way of ensuring that tax treaty disputes are effectively resolved through MAP. Whilst there is no consensus among all OECD and G20 countries on the adoption of arbitration as a mechanism to ensure the resolution of MAP cases, a group of countries has committed to adopt and implement mandatory binding arbitration as a way to resolve disputes that otherwise prevent the resolution of cases through the mutual agreement procedure. The countries that have expressed interest in doing so include Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States; this represents a major step forward as together these countries are involved in more than 90 percent of outstanding MAP cases at the end of 2013, as reported to the OECD.[42]

Double tax conventions signed by developing countries do not always follow the so-called "International Tax Regime" or "OECD Standards." For instance, as noted by Luís Eduardo Schoueri, Brazil is an example of a country that has been successful in developing a tax treaty policy of its own,[43] that departs from the OECD Model and is closer to the UN Model Convention.[44]

One of the most disregarded features of legal interpretation is that it is not merely declaratory but also has a relevant creative aspect. As this author pointed out in another study:

> "Marco Aurélio Greco is absolutely correct when he states that 'the interpreter has a duty of fidelity to the text, but this does not mean that the result of the interpretation is something merely mathematical or deductive logic'."
>
> "It cannot be denied, therefore, that within the linguistic limits of the normative text the interpreter exercises a creative function, consisting of determining which of the possible meanings of the text will form part of the individual and concrete norm."
>
> "The recognition that interpretation comprises a creative function does not mean that the interpreter creates the norm from nothing, *ex nihilo*. According to Eros Roberto Grau, 'the product of the interpretation is the norm expressed as such. But it (the norm) partially preexists, potentially, in the cover of the text, the cover of the statement'."
>
> "Accordingly, the interpreter creates, but does not create from nothing, nor does his task cease to be circumscribed by limits contained in the text interpreted, in the values and interests at stake, which eliminate any decision making."[45]

42. OECD, *Making Dispute Resolution Mechanisms More Effective* (OECD, 2015) p. 41.
43. Luís Eduardo Schoueri, "Contribuição à História dos Acordos de Bitributação: a Experiência Brasileira" (2002) 22 *Revista Direito Tributário Atual*, p. 280.
44. Sergio André Rocha, "El Proyecto BEPS de la OCDE y el Derecho Fiscal Internacional en Brasil" (2016) 35 *Revista Direito Tributário Atual*, pp. 388–389.
45. Sergio André Rocha, *Interpretation of Double Taxation Conventions: General Theory and Brazilian Perspective* (Kluwer, 2009) pp. 66–67.

If treaties signed by developing countries depart many times from what is the "OECD Standard," and if the interpretation of legal texts and international treaties alike is definitely a creative endeavor, it is certainly dangerous for countries that have been able to put in place their own international treaty policy, to subject themselves to international binding arbitration, which could become an instrument of "International Tax Imperialism."

Not even the fact that there would be arbitrators from developing countries participating in the arbitration procedure reduces this concern. In fact, as noted in the previous topic, "Theoretical International Tax Imperialism" knows no borders. Therefore, in this author's view, subscribing to the use of international binding arbitration as a mechanism to settle disputes could be the same as being exposed to an interpretative override of a country's treaty policy.

In November 2016, the OECD published the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the "Multilateral Convention"). Part VI of the Multilateral Convention established rules regarding arbitration. Its Article 19 deals with Mandatory Binding Arbitration.

In light of previous comments, it is this author's opinion that developing countries should not adhere to the Mandatory Binding Arbitration provision of the Multilateral Convention. This would avoid the risk of having their treaty policy overridden by international binding arbitration.

[B] Transfer Pricing

Perhaps an interesting starting point for this topic is to question whether the BEPS work on transfer pricing highlights a shift in the focus of transfer pricing rules, as is argued by Luís Eduardo Schoueri.

Per Schoueri's lesson, "While originally conceived as an anti-avoidance mechanism, transfer pricing and the related debates have gradually moved towards a consideration of the taxation of the 'fair share' on profits derived by multinational enterprises (MNEs), irrespective of any concern based on the actual income derived from an activity subject to a state's jurisdiction."[46]

In his view, transfer-pricing rules were not initially meant to deal with the sharing of tax revenues between countries, but to deal with "the need for equality between related and unrelated firms."[47]

If this is the case – even though nothing in the BEPS Project clearly indicates that one of its goals is to change existing rules for taxing rights allocation – a combination of Actions 8, 9, and 10 with Action 13 could set the stage for debates regarding the rightful – or fair – allocation of taxing rights between states, which could harm developing countries.

46. Luís Eduardo Schoueri, Arm's Length: Beyond the Guidelines of the OECD (2015) 69 (12) *Bulletin for International Taxation*, p. 690.
47. Luís Eduardo Schoueri, Arm's Length: Beyond the Guidelines of the OECD (2015) 69 (12) *Bulletin for International Taxation*, p. 695.

In fact, in the whole discussion about risks and functions, there is one outsider that is incredibly relevant for developing countries: the consumer market, which is usually the contribution of such countries to the international flow of goods, services, and intangibles.

Using Brazil as an example, the country's transfer pricing rules are based on an adjusted version of the arm's length principle. The focus of Brazil's rules is simplicity.[48] It is to allow a more direct application of the rules by tax authorities and taxpayers. The country has already stated that it does not intend to change its transfer pricing because of BEPS[49] – and it is right in doing so.

Indeed, developing economies should not be rushing to adopt OECD recommendations. They need to consider whether they are actually necessary given their own economic reality and whether the OECD proposed model is the best taking into account its circumstances. As noted by Gemma Patón Garcia, "The adoption of the recommendations of the BEPS Plan must be the result of a meditated process by each state, considering the Plan's evolution on the international scene. However, it is not less certain that national initiatives must be adjusted to the social and economic reality of each country. Moreover, such initiatives should avoid conflicts with the tax administration of other countries with which it has commercial relations, in view of the possibility of such relationships being affected in its competitiveness."[50]

[C] Hybrid Mismatches

Hybrid mismatch arrangements are a direct consequence of the regular exercise of each country's tax sovereignty in the design of their own tax systems. Such design creates opportunities that can be used by multinationals to enjoy an overall reduced tax burden on their transactions.

One might say that there is nothing wrong with what multinationals do when they explore such hybrid mismatches. Per Reinout de Boers and Otto Marres, "A cynical take might be that only two universal principles apply in international tax: the first principle being that states will take what tax revenue they can get (where possible and at the expense of other states through tax competition); the second principle being that taxpayers will pay as little tax as they can (legally) get away (where possible using aggressive tax planning."[51]

Notwithstanding, at the core of the problem of hybrid mismatches is a crucial discussion regarding which country is entitled to tax revenue. Referring again to the article of Reinout de Boers and Otto Marres, "The very nature of hybrid mismatch

48. *See* Marcos Aurélio Pereira Valadão, "Brazil Country Practices," United Nations, *United Nations Practical Manual on Transfer Pricing for Developing Countries* (United Nations, 2013) pp. 370–371.
49. OECD. *Aligning Transfer Pricing Outcomes with Value Creation* (Paris: OECD, 2015) p. 185.
50. Gemma Patón Garcia, Análisis de las Medidas Españolas Alineadas con el Plan de Acción BEPS: Desafíos en la Implementación e Incidencia en Latinoamérica, ILADT, *Memorias de las XXVII Jornadas Latinoamericanas de Derecho Tributario* (ILADT: Mexico, 2015) p. 189.
51. Reinout de Boers and Otto Marres, "BEPS Action 2: Neutralizing the Effects on Hybrid Mismatches Arrangements" (2015) 43 (1) *Intertax*, p. 14.

arrangements – which benefit from at least two tax systems and which operate fully within the scope of each such system – renders it impossible to identify the loser state that should repair the mismatch."[52]

This is an area of concern for developing countries. At the heart of the discussions about the tax treatment of hybrids, there is a debate about the allocation of taxing rights. This topic was disciplined by Part II of the Multilateral Convention. In addition to these rules, the OECD has expressed opinions about some regimes established domestically by countries. For instance, in the case of Brazil, the OECD manifested its opinion against the country's dividend exemption and interest on net equity deduction.

The impact of "aggressive tax planning" on the overall tax collection of developing countries should not be highly relevant. Such countries should weigh the pros and cons of OECD's recommendations in this area before adopting them – or changing their own domestic regulations.

[D] Digital Economy

The outcomes of BEPS Action 1 are disappointing. This is one of the few Actions where a shift of taxing rights could actually take place. Is this a signal that developed nations are pushing back on changes that might result in a loss of tax revenues? This might be the case. This is the opinion of Eva Escribano López, according to whom "The brave, out-of-the-box reform promised by the BEPS report, has been watered down by an Action Plan which, at one stroke, left out of the debate two of the main pillars that sustain the tax system (separate entity approach and standards on the allocation of taxing rights). And what is worse, the most disruptive of the actions, number 1, seems doomed to failure given the predictable internal resistances within the OECD forum. Hence, the outcome we could expect from BEPS will not be the promised comprehensive reform but rather a combination of measures aimed at restoring the effectiveness of current principles."[53]

Developing countries should push towards the development of new permanent establishment rules for the digital economy or reinforce their domestic tax withholding rules. The latter option has been working for Brazil, due to provisions in its tax treaties allowing taxation of technical services at source. However, it has its shortcomings when it comes to the taxation of commerce of goods from digital platforms.

[E] Improper Use of Tax Treaties

There is a lot of debate regarding treaty shopping or, as the report on BEPS Action 6 calls it, the "granting of treaty benefits in inappropriate circumstances." It raises interesting and at the same time difficult questions. In fact, to ascertain what "inappropriate circumstances" are, one must determine what "appropriate

52. Reinout de Boers and Otto Marres, "BEPS Action 2: Neutralizing the Effects on Hybrid Mismatches Arrangements" (2015) 43 (1) *Intertax*, p. 14.
53. Eva Escribano López, "An Opportunistic, and yet Appropriate, Revision of the Source Threshold for Twenty-First Century Tax Treaties" (2015) 43 (1) *Intertax*, p. 13.

circumstances" are. This task leads to determining what functions are served by a tax treaty, which may vary between the perspectives of a developed country and a developing country.

Indeed, as noted by Paulo Ayres Barreto and Caio Augusto Takano, some argue that in the case of developing countries' tax policies, treaty shopping as an instrument to attract of foreign investments can be considered one of the goals of a treaty. In their words:

> "Accordingly, it seems that the effective attraction of technology and foreign investment to a country which grants the benefits of a tax treaty to a person that (i) is not entitled to such benefits and (ii) indirectly obtains such benefits through the use of a genuine and productive entity (which would otherwise qualify as a resident of one of the contracting states), is not contrary to the objectives and purposes of income tax treaties and thus should not be regarded as an abuse ('improper use') of the particular treaty. If the existence of a legitimate business structure is verified and so enhances investment levels and foreign capital in the country, there is no reason to condemn the behaviour of both the taxpayer (tax avoidance) and that state (tolerating treaty shopping arrangements)."
>
> "In this sense, the decision of the Supreme Court of India in the Azadi Bachao Andolan case is paradigmatic. Although a comprehensive analysis of the case is beyond the scope of this article 25 a brief overview offers a valuable contribution to the discussion. In this case, the possibility to use the tax treaty between Mauritius and India to attract foreign investment and capital was expressly recognized by the Indian authorities, even though treaty benefits were indirectly granted to residents in third countries that had used structures crafted with the sole purpose of obtaining the benefits of the India-Mauritius treaty."
>
> "The decision of the Supreme Court of India has the merit of acknowledging that, without a specific limitation-on-benefits rule in the India-Mauritius treaty, its benefits should be granted to parties which, from a formal perspective, may be considered as residents of one of the contracting states and thus are entitled to the benefits of the treaty. […]."[54]

These comments by Barreto and Takano bring a different perspective to debates regarding the so-called "improper use of tax treaties" from a developing country's perspective. This same position was defended by Luís Eduardo Schoueri. According to him:

> "Regarding treaty shopping, the abuse threshold is more complex, considering that it is not clear whether the fact of a third person using the benefits of the double tax convention can be considered abusive. In fact, if a double tax treaty is seen only as an instrument for mutual concessions to avoid double taxation, then it is clear that the balance initially envisaged by the parties will be undone if the concessions of one state surpasses those of the other, based on reciprocity."
>
> "However, if this assumption can be accepted in the case of conventions between countries with the same development level, this reasoning must be divergent when considering a relation between a developing and a developed country. In this case, as stated above, the flow of capital and income is unilateral. To the concessions

54. Paulo Ayres Barreto and Caio Augusto, "The Prevention of Tax Treaty Abuse in the BEPS Action 6: A Brazilian Perspective" (2015) 43 (12) *Intertax*, p. 828.

> made by one of the contracting states (the source state) investment must follow. Hence, equal concessions by both states are not expected. Therefore, it does not seem to be an immediate conclusion that the use of a treaty by a resident of a third State would be considered abusive, as long as that investment resulted on an increment of investment in that state granting the benefits."[55]

Considering these comments, it seems that developing countries should not be too eager in lining up to fight treaty shopping. Most such countries do not have large treaty networks. For instance, Brazil, with its thirty-two double tax conventions, leads Latin America's countries in the number of treaties in force. Therefore, from a developing country's perspective, sometimes treaty shopping is a way of enlarging its treaty network without having to negotiate and sign dozens of new treaties.

The Multilateral Convention established several rules against treaty abuse in its Part III (Articles 6–11). Before adhering to these provisions, developing countries should be conscious about their own treaty policy – which is not always the case. If the country considers treaty shopping to be an integral part of its international tax policy, as a means for channeling foreign direct investment, they should think twice before subscribing to these articles of the Multilateral Convention.

§9.05 IN THE DEFENSE OF A "DEVELOPING COUNTRIES' INTERNATIONAL TAX REGIME"

Given the prior comments, it seems clear that there is not a single "International Tax Regime" – a set of principles that guide a group of countries' positions in defining taxation for cross-border transactions. There is at least one regime that applies to developed countries and another applicable to developing countries. It is likely that even among developing countries there is more than one "International Tax Regime."

It is this author's view that the heart of a "Developing Countries' International Tax Regime" would be the elimination of Article 7 as it stands today. It would be replaced with a provision that would allocate taxing rights to the source country, even without the presence of a permanent establishment.

Not even the League of Nations Model (approved in the Mexico meeting of 1943) had such a bold provision guaranteeing source country taxation rights. Its business profits article had the following wording:

> Article IV
> 1. Income from any industrial, commercial or agricultural business and from any other gainful activity shall be taxable only in the State where the business or activity is carried out.
> 2. If an enterprise or an individual in one of the Contracting States extends its or his activities to the other State, through isolated or occasional transactions, without possessing in that State a permanent establishment, the income derived from such activities shall be taxable only in the first State.

55. Luís Eduardo Schoueri, "Tributação e Cooperação Internacional" (2004) 18 *Revista Direito Tributário Atual*, p. 62.

3. If an enterprise has a permanent establishment in each of the Contracting States, each State shall tax that part of the income which is produced in its territory.
4. As regards agricultural and mining raw material and other natural materials and products, the income which results from prices prevailing between independent persons or conforming to world market quotations shall be regarded as realized in the State in which such materials or products have been produced.[56]

The end of Article 7 as it stands today would be the death certificate for various controversies generated by the concept of permanent establishment and the application of Article 5, putting an end to "aggressive tax planning" involving permanent establishments.

Another integral part of a "Developing Countries' International Tax Regime" would be reasonable source taxation on "passive income." Such taxation on dividend and interest payments should be as high as 15%. Moreover, there is no argument to justify non-taxation of royalties at source.[57] Therefore, all developing countries should follow Articles 10, 11, and 12 of UN Model, instead of their counterparts in the OECD Model. The same goes for taxation of "other income," which should be shared between source and residence countries, as established in Article 21(3) of the UN Model.

As pointed out in section §9.03[A] above, another concern of developing counties should be the mechanisms to settle disputes. Given that there is a creative aspect to interpretation,[58] "International Tax Imperialism" requires developing countries to be extra careful before subscribing to mandatory binding arbitration as a mechanism to settle disputes.

Consider, for instance, the case of Brazil, a country with its own treaty policy and one not aligned with OECD standards. Here there is a clear risk of its being overridden by international arbitration. The country's treaties usually employ Article 7, by: (a) establishing that technical services should be taxed as royalties; (b) including the lease of scientific, industrial, and commercial equipment in the concept of royalties; and (c) including insurance and re-insurance in the scope of Article 5 – as provided for in the UN Model Convention.

The taxation of technical services as royalties in Brazil's treaties – which is absent only in the treaties signed with Austria, Finland, France, Japan, and Sweden – is very controversial, and it could trigger a mutual agreement procedure followed by international arbitration.

Would it be favorable to the country to subject itself to international arbitration in this case? It seems that the answer is no.

56. Available at Roy Rohatgi, *Basic International Taxation*, 2nd Ed. (Richmond, 2005) p. 416.
57. In his review of reports from thirty-seven countries, Pasquale Pistone says, "Bilateral treaties around the world undoubtedly show that the influence of the OECD Model royalties clause is more the exception than the rule. The UN royalties clause is instead the main point of reference for bilateral tax treaty clauses on royalties, which are often accompanied by additional dedicated provisions." (Pasquale Pistone, "General Report," Michael Lang, Pasquale Pistone, Josef Schuch, and Claus Staringer (eds.), *The Impact of OECD and UN Model Conventions on Bilateral Tax Treaties* (Cambridge University Press, 2012) p. 21).
58. *See* footnote 44.

Therefore, it is this author's view that the "Developing Countries' International Tax Regime" should not include the use of arbitration to settle disputes pertaining to the interpretation of tax treaties. This position would lead to developing countries non-adherence to Articles 18 through 26 of the Multilateral Convention.

§9.06 TAX SOVEREIGNTY IN POST-BEPS TIMES

One of the most identifiable trends in International Taxation in the twenty-first century is standardization and multilateralism. This is the age that social science scholars refer to as risk-society.

According to Ulrich Beck, "In the sense of a social theory and a diagnosis of culture, the concept of risk society designated a stage of modernity in which the threats produced so far on the path of industrial society begin to predominate. This raises the issue of the self-limitation of that development as well as the task of re-determining the standards (of responsibility, safety, monitoring, damage limitation, and distribution of the consequences of damage) attained so far with attention to the potential threats."[59]

Anthony Giddens is another scholar who has studied risk-society at length. In his opinion, "Modernity also has a sombre side, which has become very apparent in the present [*20* th] century."[60]

Giddens further argues that "A skeptic might ask, is there anything new here? Hasn't human life always been marked by contingency? Hasn't the future always been open and problematic? The answer is 'yes' to each of these questions. It is not that our life-circumstances today have become less predictable than they used to be; rather the origins of unpredictability have changed. Many uncertainties which face us today have been created by the very growth of human knowledge."[61]

In the industrial age, there was an assumption that passing a new law could solve any social problem. Even though laws were post-factum, they would be able to deal with the new problems created by social interaction.

Risk-society puts this notion in check. One of the major characteristics of risk-society is that there are problems that require a solution that cannot be obtained through any isolated intervention of a single country's legislator.[62] We are referring to problems such as: terrorism; international economic crises; international trafficking of drugs, weapons, and even persons; and degradation of the environment, etc. In the international tax area, the best examples are international tax evasion and aggressive tax planning as well as the budgetary deleterious effects of economic and fiscal crises.

59. Ulrich Beck, "The Reinvention of Politics," Ulrich Beck, Anthony Giddens, and Scott Lash (eds.), *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Stanford University Press, 1994) p. 6.
60. Anthony Giddens, *The Consequences of Modernity* (Stanford University Press, 1990) p. 7.
61. Anthony Giddens, "Risk, trust, reflexivity," Ulrich Beck, Anthony Giddens, and Scott Lash (eds.), *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Stanford University Press, 1994) p. 185.
62. *See* André-Jean Arnaud, *O Direito Traído pela Filosofia* (Sergio Antonio Fabris Editor, 1991) p. 246.

Brazilian Professor Ricardo Lobo Torres has dedicated part of his research to the analysis of the legal effects of risk-society. In his words, "Risk-society is characterized by some relevant features: ambivalence, insecurity, the search for new principles, and the redrafting of the interactions between States' institutions and society."[63]

Typical risk-society problems require a combined effort from countries and international institutions in pursuing a solution. In other words, such a solution will usually be a multilateral endeavor rather than an isolated effort.

Globalization, the emergence of the digital economy, harmful tax competition among countries, and the new role of services and intangibles have all created potential environment for tax evasion and aggressive tax planning.[64]

One of the features of this international context is that it introduces several paradoxes. For instance, we are witnessing the emergence of a cooperative international tax regime, which, on the other hand, co-exists with international tax competition. In other words, the same countries that cooperate also compete for tax revenues – and this competition is at the source of the problems that require greater cooperation. The same is valid for tax sovereignty.

To some extent, countries' tax sovereignty in the design of their domestic tax systems is intrinsically related to harmful tax competition. In turn, this is intrinsically related to aggressive tax planning – which triggered the BEPS Project, which requires multilateralism and some degree of reduced tax sovereignty. Hence, the paradox: too much tax sovereignty leads to less tax sovereignty.

No doubt, the new international tax environment poses a threat to developing countries' tax sovereignty. The American FATCA provides us with the best example. Because of its economic power, the United States decided that it could – and it actually did – force countries into signing treaties and modifying their domestic regulations whether or not they needed automatic exchange of information of their residents' accounts in the U.S.

This does not imply that developing countries should not engage in the current international tax debates, or that they should reject participating in the BEPS Project as a whole. This author's concern is that multilateralism becomes a mechanism to impose, top down, certain tax positions that are not in favor of developing countries.

Accordingly, it is this author's opinion that the BEPS Project is both an opportunity and a risk for developing countries. Countries that have a sufficiently strong international tax policy can "cherry-pick" what is interesting for them in the Project and discard whatever recommendations seem inappropriate. Thus, the BEPS Project is an opportunity to participate in and engage in a high-level international taxation debate that is happening worldwide. However, for countries that are exposed to pressures from developed countries and do not have a well-formed international tax policy, it seems that the BEPS Project also poses a threat.

63. Ricardo Lobo Torres, *Tratado de Direito Constitucional, Financeiro e Tributário: Valores e Princípios Constitucionais Tributários* (Renovar, 2005) p. 177. *See also* Sergio André Rocha, *Tributação Internacional* (QuartierLatin, 2013) pp. 16–49.

64. *See* Victor Uckmar, et.al. *Diritto Tributario Internazionale* (CEDAM, 2012) pp. XXVI–XXXII.

§9.07 FINAL REMARKS

Changes in international taxation that started recently will echo in the years to come. It seems that the focus on collection optimization has eclipsed the discussion regarding the rightful limits of states' taxing powers. On the other hand, one should not forget that debates about the reshaping of the so-called International Tax Regime started with a discussion about precisely what is a country's "fair share of tax."

Current multilateralism was born in the context of struggles for tax revenues. This fact suggests that states engaging in these debates are certainly pursuing an increase in their tax collections. At first glance, it may seem that such tax collection will come from just fighting "aggressive tax planning." However, it is clear that, in some cases, tax collection will result from reshaping the allocation of taxing powers among countries.

Since the dawn of the "International Tax Regime," it is clear that it favors developed countries and reduces the scope of developing countries' taxation powers. However, reviewing the balance between these two groups is not the scope of the BEPS Project or any other international initiative.

It is time for a change. Developing countries should join in the formation of a "Developing Countries' International Tax Regime." Therefore, they should definitely not be too eager to line up in accepting the BEPS Project's recommendations.